APPENDIX

APPENDIX A.

GENERAL ORDINANCES OF THE CITY OF LOUISVILLE, KENTUCKY.

§85-8 Disorderly Conduct, Penalty. (a) Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), or imprisoned not exceeding fifty (50) days, or both so fined and imprisoned.

(b) In addition to imposing a fine, the Police Court may hold the offender to bail in a sum not exceeding one thousand dollars ($1,000.00) to keep the peace, or be of good behavior for any length of time not exceeding one year.

(c) Should the offender fail to give bond or fail to pay the fine, he shall be forthwith committed to the city workhouse, and shall be kept in custody until bail be given, or until the time fixed by the judgment shall have expired and the fine be paid or satisfied by labor as provided by law.

§85-12 Loitering, Prohibited. It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville; or for such person or persons to sleep, lie, loaf; or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; or for such person or persons to sleep or lie in or upon any public thoroughfare, highway, park, boulevard, or wharf of the City of Louisville; or for such person or persons to beg or solicit alms in the streets or the highways of the City of

Louisville; or for such person or persons to habitually consort with bawds, thieves, malefactors, or other disreputable or dangerous characters in the City of Louisville.

§85-13 Penalty. Any person violating this ordinance shall be guilty of the offense of loitering, and shall be liable to arrest therefor; and for each offense shall be punished by a fine of not exceeding fifty ($50.00) dollars, or he shall be compelled to give bond in the sum of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, conditioned upon his or her good behavior, and keeping the peace for not exceeding one year; and in default of such bond, if the same be required, the defendant shall be imprisoned in the workhouse, and there confined during the period said bond was to cover, or until the same shall be executed as required; or the defendant may be both so fined and required to execute a bond to be of good behavior as aforesaid, in the discretion of the court.

APPENDIX B.

OPINIONS OF JEFFERSON CIRCUIT COURT AND KENTUCKY COURT OF APPEALS.

JEFFERSON CIRCUIT COURT
Common Pleas Branch, Fifth Division
No. 40175.

Sam Thompson, - - - - - - - - Petitioner,

v.

Hugo Taustine, Judge, Police Court, Louisville, Kentucky,
Solon F. Russell, Sheriff of Jefferson County, and
Kenneth Wildt, Bailiff of Police Court, Louisville, Kentucky, - - - - - - - - Respondents.

OPINION OF GRAUMAN, J.

Petitioner, Sam Thompson, has been convicted in the Louisville Police Court of two crimes, loitering and disorderly conduct. He claims that the convictions are without any foundation in the evidence (which has been transcribed by the official stenographer of the Police Court and which has been read by this court); that, however, unless reversed they will foreclose him from recovery of damages for two arrests which he claims were arbitrary and without legal cause; that the two arrests were reprisals against him for exercising his legal right to retain counsel and demand a judicial hearing on an earlier criminal charge that has since been filed away; and that, in the absence of

any evidence to support the convictions, it must be concluded that the convictions resulted from the desire of the Police Court Judge to protect the arresting officers from civil actions for malicious prosecution. For these reasons petitioner claims that the convictions deprive him of his liberty and property without due process of law, in violation of the 14th Amendment to the United States Constitution.

An examination of the record (including the two Police Court transcripts and the two judgments of conviction referred to above, which have been made available to this court and are now ordered filed as a part of the record) shows that these Federal Constitutional claims are substantial and not frivolous.

Petitioner has no remedy in the Kentucky courts. The $10.00 fines are too small to be appealable. Review by way of the statutory writ of prohibition (KRS 26.080) is not available, since petitioner is not here questioning the legality of the loitering and disorderly conduct ordinances on which the convictions were based. The convictions can not be tested by habeas corpus, since the Police Court's jurisdiction over the person and the subject matter is not questioned. Petitioner's only recourse is, therefore, to seek review on certiorari in the United States Supreme Court, for which he may petition within 90 days after the February 3, 1959, judgments. He has stated his intention to file such a petition.

There is, however, no statutory provision for stay of execution and bail pending such application for certiorari. Under KRS 26.070, the Police Court itself is forbidden to suspend execution of sentence for more than 24 hours. Nor is there any statutory provision authorizing any other court to grant a stay and bail pending the application for certiorari. But if petitioner goes to jail for 10 days before

he can file a petition with the United States Supreme Court, he will have served out his fines (at the rate of $2.00 per day) and the cases will then be moot. It is not possible to obtain a ruling on the certiorari petition within that short a time. Thus, unless power to grant a stay and bail resides in this court, petitioner will have no way to obtain a ruling on his claims of Federal Constitutional right.

There is no wrong for which the law does not provide a remedy, and no right without appropriate procedure to protect the right. In my opinion, the petitioner has a Federal Constitutional right, under the due process clause of the 14th Amendment, which this court is sworn to uphold, to be allowed an opportunity to present his Federal Constitutional claims to the only court which has jurisdiction to entertain them—the United States Supreme Court.

It is provided by Article XIV, Section 1, of the Constitution of the United States:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Who is to say, finally, whether given action of a state is violative of the 14th Amendment? The answer is: "The Supreme Court of the United States." Very soon after the adoption of the Constitution arose the questions: "Is it with the national or the state judiciary to say whether the Union has exceeded its powers, or whether a state statute is repugnant to the Federal Constitution?" "Has the state or the nation right to answer this question finally?" It is exclusively with the Supreme Court of the United States to say, finally and decisively, whether given action of a state violates the 14th Amendment. The infraction of the amendment may be by a municipal corporation, or by a

state legislature, or by a governor of a state. Penn. Mutual v. City of Austin, 168 U. S. 685.

Mr. Justice Bradley of the Supreme Court of the United States has said that the words "life" and "liberty" cover all rights which the Declaration of Independence declares all men inalienably endowed with—"Life, liberty and the pursuit of happiness." See Butchers Union v. Crescent City, 111 U. S. 746; Allgeyer v. Louisiana, 165 U. S. 578. Many times the Supreme Court of the United States has been called upon to pass on the question as to whether or not the conviction by a state court is consistent with the due process of law required by the 14th Amendment. In Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, it is stated:

> "The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53, S. Ct. 55, 77 L. Ed. 158, 84 ALR 527. * * * The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lies at the base of all our civil and political institutions.'"

The Petitioner Thompson, through counsel, vigorously insists that there is no evidence upon which conviction and sentence by the Police Court could be based (there appears to be merit in this contention); further, that it permitted conviction although the convictions and sentences are void for want of the essential elements of due process and the proceeding thus vitiated is subject to challenge before the United States Supreme Court.

As the Petitioner Thompson has no appeal from the judgments of the Police Court to a higher state court, no state court can entertain the challenge and consider the federal question presented. If petitioner is correct in his contentions, then unless this court admits him to bail and stays the enforcement of the Police Court judgments while he is applying to the United States Supreme Court to enforce his constitutional right, he will be denied a federal right, fully established and specially set up and claimed at his trial in the Police Court.

It is not without precedent for the United States Supreme Court to review conviction of a defendant in a police court, where the convicted person claims he was denied due process of law. In Terminiello, Petitioner v. City of Chicago, 337 U. S. 1, 69 S. Ct. 245, 93 L. Ed. 1131, Terminiello was convicted of disorderly conduct, in violation of a city ordinance of Chicago, and fined $100.00. The United States Supreme Court held that the ordinance as construed and applied to him violated his constitutional right of free speech. The conviction was reversed by the United States Supreme Court because the Municipal Court of Chicago had infringed his constitutional right of free speech.

In justice to all concerned, and with the rights of the City of Louisville fully protected, I believe that the application of petitioner for stay should be granted. Therefore, it is my order that petitioner give bond, with good, approved surety, or deposit currency in the amount of $35.00, with the Clerk (the two fines are for $10.00 each and there are no court costs charged in the Louisville Police Court) of this court, that he will render himself in execution of the Police Court judgments if he fails to procure writ of certiorari from the Supreme Court of the United States. For the reasons stated above I have granted peti-

tioner's application for stay and bail, and will, therefore, enter an order granting the application for stay and releasing the petitioner; upon the execution of bond or deposit of $35.00 in currency of the United States, under an order which I will sign carrying out this opinion.

(s) Lawrence S. Grauman,
Judge.

COURT OF APPEALS OF KENTUCKY

Hugo Taustine, Judge, etc., Et Al., - - Appellants,

v.

Sam Thompson, Et Al., - - - - Appellee.

Appeal from Jefferson Circuit Court,
Common Pleas Branch, Fifth Division,
Hon. Lawrence S. Grauman, Judge.

OPINION OF THE COURT BY JUDGE SIMS—REVERSING.

This appeal is from a judgment of the Jefferson Circuit Court, Common Pleas Branch, Fifth Division, granting Sam Thompson a writ of habeas corpus against Hon. Hugo Taustine, Judge of the Police Court of Louisville, Kenneth Wildt, Bailiff of that court and Solon Russell, Sheriff of Jefferson County, wherein appellants were ordered to release Thompson from custody upon his executing bond in the sum of $35 in order that he may file in the United States Supreme Court on or before May 4, 1959, his petition for a writ of certiorari. The judgment further recites that if Thompson does not file his petition for certiorari on or before that date, or if such writ is not granted, or if the judgments of the police court are affirmed by the Supreme Court, then Thompson shall surrender himself and serve the judgments of the police court.

The petition in the circuit court averred Thompson was convicted in the police court on the charges of loitering and of disorderly conduct and he was fined $10 in each case, which fines are too small to be appealable to any court in Kentucky, KRS 26.080(1); that appellee is a poor person

and cannot pay these fines and must serve them out in jail at the rate of $2 per day.* The petition further avers Thompson is not guilty of the charges upon which he was convicted and that no evidence was introduced to support such judgments; that at the close of the prosecution's evidence in each case Thompson moved for the dismissal of the charge on the ground that he was deprived of his liberty without due process of law under the Fourteenth Amendment of the Federal Constitution, which motions were overruled; that the two fines would be served out in jail in ten days which would not allow him sufficient time to prepare and file his petition for certiorari and the question would be moot before he could get a hearing on his petition in the Supreme Court; that appellee applied to the police judge for a stay of execution, but under KRS 26.070(2) the police judge can only suspend the execution of judgment for twenty-four hours, which twenty-four hour stay was granted in order that he might file his petition for a writ of habeas corpus.

The opinion of Hon. Lawrence Grauman, Judge of the Jefferson Circuit Court, which granted the writ of habeas corpus, recites that an examination of the records of the police court, including the transcripts of evidence of the two trials, "shows that these federal constitutional claims are substantial and not frivolous." The majority of this court agree with this statement of Judge Grauman. It will be noted the judgment of the circuit court does not in reality grant appellee a writ of habeas corpus but only a stay of execution of his fines and orders him released from jail on bond until May 4, 1959, so that he may file a petition for certiorari in the Supreme Court.

*Petitioner did not in fact plead inability to pay the fines, but the Court's error on this point is immaterial. [Footnote by counsel.]

Patently, Judge Grauman realized that the writ of habeas corpus is a collateral attack on the judgments and will not lie unless the judgments are void. Com. v. Crawford, 285 Ky. 382, 147 S. W. 2d 1019; Smith v. Buchanan, 291 Ky. 44, 163 S. W. 2d 5, 145 ALR 2d 1019; Bircham v. Buchanan, Ky., 245 S. W. 2d 934. Here, the police court had jurisdiction of the subject matter and of Thompson and it is manifest the judgments are not void. To meet the exigency of the situation, Judge Grauman granted Thompson a stay of execution to allow him time to prepare and file his petition for certiorari in the Supreme Court and merely called his order a writ of habeas corpus as the order is somewhat akin to such writ.

Judge Grauman must have had in mind §110 of the Kentucky Constitution which gives this court the power "to issue such writs as may be necessary to give it a general control over inferior jurisdictions." But §110 does not give to a circuit court such control of courts inferior to it. Circuit courts in this Commonwealth have no prohibitive jurisdiction over inferior courts where such inferior courts are acting within their jurisdiction even though erroneously. If an inferior court is proceeding erroneously within its jurisdiction and irreparable injury will result to a litigant, with no adequate remedy at law, then the prohibitive jurisdiction lies in this court under §110 of our Constitution. Potter v. Trivette, 303 Ky. 216, 197 S. W. 2d 245. As the Louisville Police Court was acting within its jurisdiction, it appears that the circuit court erred in granting appellee a stay of execution, as only this court may do that under §110.

While we must reverse the judgment, the majority of this court are not inclined to put appellee to the trouble and expense, as well as the delay, of filing an original action in this court when we know that our decision will be to

direct the Louisville Police Court to stay execution of its two judgments and release appellee on bond for three months to give him time to prepare and file in the Supreme Court his petition for certiorari. Therefore, we have concluded to dispose of the matter in this opinion.

Appellee appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

Appellants urge that as 28 USCA §1257(3) provides for review by certiorari of a final judgment of the highest state court in which a decision may be had where the infringement of a constitutional right is claimed, and as 28 USCA §2101(f) provides a stay may be granted by a Justice of the Supreme Court when application is made under Rule 27 of that court, that appellee should make application for a stay to a Justice of the Supreme Court rather than to this court. Our answer to this argument is that it is often difficult to contact a Justice of the Supreme Court and may necessitate a trip to Washington. In this instance appellee may have great difficulty after preparing his petition for a stay to get same in the hands of a Supreme Court Justice in the short time of ten days.

In Walters v. Fowler, Ky., 280 S. W. 2d 523, appellant sought a writ of prohibition to prevent the collection of a $5 fine, averring that his right of due process under the Fourteenth Amendment had been violated in the imposition

of the fine and he would suffer great and irreparable injury unless the writ was granted, since he had no remedy by appeal. We denied the writ of prohibition and held that the imposition and collection of a $5 fine was not such great injustice or irreparable injury as would justify the granting of the writ. The distinction between that case and the instant one is Walters did not ask a writ of prohibition so he might go to the United States Supreme Court for its determination of whether or not he had been denied due process, while in the case at bar appellee seeks a stay of execution for that very purpose. It is only in extreme cases like the one at bar where a person wants to go to the Supreme Court that we will interfere with an inferior court under §110 when an unappealable fine has been imposed.

We reverse the judgment of the Jefferson Circuit Court because it was without jurisdiction to enter the stay of execution. But we hereby direct Hon. Hugo Taustine, Judge of the Louisville Police Court to stay until June 1, 1959, the execution of the two judgments and direct Kenneth Wildt, Bailiff of that Court, and Solon F. Russell, Sheriff of Jefferson County, to release appellee from satisfying or serving in jail the two fines imposed on him by the judgments until June 1, 1959, on condition that appellee execute bond in the sum of $35 with good surety guaranteeing he will surrender himself to the police court on June 1, 1959, if he does not file a petition for certiorari in the Supreme Court before that date, or if the Supreme Court denies his petition, or if it affirms the judgments of the Louisville Police Court.

The judgment is reversed and the clerk of this court will prepare a mandate in conformity with this opinion and cause copies of same to be sent to Judge Taustine, Bailiff Wildt and Sheriff Russell.

DISSENTING OPINION BY CHIEF JUSTICE MONTGOMERY.

According to the majority opinion, Sam Thompson complains that he has been deprived of due process of law under the Fourteenth Amendment to the Federal Constitution because the evidence in each of two cases was insufficient to sustain the conviction. The fine in each case was under the appealable amount. No complaint is made that the police court in which he was tried did not have jurisdiction of the offense or the person. The question is: May the sufficiency of the evidence to convict in a state court be reviewed in a federal court as a violation of due process under federal law? The answer is: No.

In United States ex rel. Weber v. Ragen, CA Ill., 1949, 176 F. 2d 579, it was held that the due process of law clause does not enable federal courts to review errors of state law, however material under state law, and a federal district court sits only to determine whether the proceedings in the state court amount to a violation of federal constitutional rights. Habeas corpus cannot be utilized to correct mere errors of law committed in a trial in a state court or to try such questions as sufficiency of evidence to sustain a conviction. Petition of Sawyer, D. C. Wis. 1955, 129 F. Supp. 687, affirmed, 229 F. 2d 805, cert. denied 76 S. Ct. 1025, 351 U. S. 966, 100 L. Ed. 1486, rehearing denied 77 S. Ct. 24, 352 U. S. 860, 1 L. Ed. 2d 70.

It would appear that Thompson is attempting to secure a review under a claim of infringement of constitutional right. 28 U. S. C. A. Section 1257(3). The cited cases make it obvious why he did not seek relief in the federal district court. Instead, he is attempting to get a review to which he is not entitled, under either the federal or state law, by perverting the habeas corpus process. Both this Court and the lower court recognized that the judgments of conviction

were not subject to collateral attack since they were not void. In two recent cases, Thompson v. Wood, Ky., 277 S. W. 2d 472, and Walters v. Fowler, Ky. 280 S. W. 2d 523, this Court refused to grant relief by prohibition in similar situations.

I see no reason to violate our rule and grant any relief herein, and for this reason I respectfully dissent.

Judges Moremen and Stewart join in this dissent.

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